

Elizabeth Burton Ortiz, Bar No. 012838
Executive Director
Arizona Prosecuting Attorneys'
Advisory Council
1951 West Camelback Road, Suite 202
Phoenix, AZ 85015-3407
(602) 542-7222 / FAX (602) 274-4215
Elizabeth.Ortiz@apaacaz.com

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

**PETITION TO AMEND THE
ARIZONA RULES OF CRIMINAL
PROCEDURE**

Supreme Court No. R-19-0016

**COMMENT OF
THE ARIZONA PROSECUTING
ATTORNEYS' ADVISORY
COUNCIL**

I. BACKGROUND OF PETITION

The Arizona Voice for Crime Victims has again petitioned the Supreme Court¹ to amend the Arizona Rules of Criminal Procedure by integrating existing victims' rights provisions from the Arizona Constitution and its implementing legislation into each applicable rule throughout the criminal rules. In conjunction with this integration, the petition again proposes the repeal of existing Rule 39 ("Victims' Rights"). Because of the overhaul of the Rules of Criminal Procedure, adopted in R-17-0002, effective January 1, 2018, the proposed amendments

¹ A substantially similar petition was filed in 2018 in R-18-0001.

1 contained in the Appendix to the petition are vastly improved from the previous
2 petition. Notably, those provisions of Rule 39(b)-(g) which were omitted from the
3 proposed integration in R-18-0001 have been included in the proposed integration
4 in this petition. Other objectionable provisions that were contained in R-18-0001
5 have been addressed or removed in the new petition.
6

7 The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") has
8 considered the proposed changes in the new petition and, as it did with R-18-0001,
9 generally supports them, with some cautionary comments. While APAAC again
10 agrees that integrating victims' rights into the various criminal rules can have a
11 meaningful impact on protecting and improving rights of crime victims, APAAC
12 has identified some recurring provisions in need of clarification, and Council
13 members continue to express concern over the full repeal of Rule 39.
14
15

16 **II. DISCUSSION/ANALYSIS**

17 In 1990, Arizona voters approved Prop 104 which amended the Arizona
18 Constitution to add a Victims' Bill of Rights ("VBR"). Ariz. Const. art. 2, § 2.1.
19 The following year, the Arizona Legislature passed the Victims' Rights
20 Implementation Act ("VRIA") which was codified as A.R.S. §§ 13-4401 *et seq.* Ch.
21 229, 1991 Ariz. Sess. Laws 1137. In its review of the proposed rule changes in this
22 new petition, APAAC has identified certain areas for suggested clarification in the
23 integration of victims' rights into the rules.
24
25

1 **A. Suggested Integration Clarifications**

2 **1. Redundancies**

3
4 As it did in its previous petition, Petitioner has taken some provisions of Rule
5 39 which are otherwise covered by the VBR and VRIA and eliminated them,
6 removing those redundancies between the various laws. However, some other
7 provisions of the VRIA have been rewritten into the proposed amended rules,
8 creating new redundancies. *See* proposed Rule 15.3(g), containing nearly identical
9 language to A.R.S. § 13-4433; proposed Rule 18.1(c), containing nearly identical
10 language to A.R.S. § 13-4419(B); proposed Rule 19.7, containing nearly identical
11 language to A.R.S. § 13-4442; proposed Rule 19.8(a), containing nearly identical
12 language to A.R.S. § 13-4434(A); and proposed Rule 27.3(c)(1)(A), containing
13 nearly identical language to A.R.S. § 13-4415(B). APAAC recommends eliminating
14 these redundancies.
15
16

17 **2. Discrepancies**

18
19 In other instances, there are duplications and discrepancies in the proposed
20 amended rules. Proposed Rule 1.2(a) contains duplicate language to proposed Rule
21 1.4(j). Proposed Rule 1.10(b)(5) contains duplicate language to proposed Rule
22 1.10(f). Proposed Rule 26.4 (“Presentence Report”) mirrors current Rule 39(b)(15)
23 giving a victim the right to have a “copy” of the presentence report. However,
24 A.R.S. § 13-4425 gives a victim the right “to inspect” the presentence report.
25

1 APAAC recommends that this discrepancy be addressed in the petition.

2 3. Elevating Victims to Party Status

3
4 Some provisions of the proposed rule changes in the petition can be read to
5 elevate victims to a “party” status. Rule 1.3 (“Computation of Time”) computes
6 certain time limitations for when a party may or must act. The petition again
7 proposes adding “*or crime victim*” as an actor under the rule. Proposed Rule
8 1.3(a)(5). Similarly, Rule 1.7 (“Filing and Service of Documents”) provides for how
9 and when documents are filed with the court. The petition proposes that every
10 person filing a document with any court must serve a copy of the document with the
11 “*victim’s attorney*.” Proposed Rule 1.7(c). Rule 1.8 (“Clerk’s Distribution of
12 Minute Entries and Other Documents”) provides for the distribution of minute entry
13 rulings. The petition proposes that every minute entry must be distributed “*to any*
14 *victim’s attorney*.” Proposed Rule 1.8(a). Finally, Rule 1.9 (“Motions, Oral
15 Argument, and Proposed Orders”) addresses the content, format and service of
16 motions. The petition proposes that a “*victim’s attorney*” be served with every
17 proposed order. Proposed Rule 1.9(f). APAAC again suggests a clarification.
18
19
20

21 Crime victims have “the right to participate and be notified of certain criminal
22 proceedings.” *State v. Lamberton*, 183 Ariz. 47, 49 (1995). However, crime victims
23 are not “parties” and have no right to “control the proceedings, to plead defenses, or
24 to examine or cross-examine witnesses.” *Id.* at 49; *see also Lindsay R. v. Cohen*,
25

1 236 Ariz. 565, 567, ¶ 8 (App. 2015) (“The VBR does not make victims ‘parties’ to
2 the prosecution[.]”); *Lynn v. Reinstein*, 205 Ariz. 186, 191 ¶ 15 (2003) (“[n]o statute
3 or rule confers party status upon a victim[.]”).
4

5 A victim does have “standing to seek an order, to bring a special action or to
6 file a notice of appearance in an appellate proceeding” in order to enforce a right or
7 challenge a denial of a right. A.R.S. § 13-4437.A. And a victim has the right to be
8 represented by counsel in asserting any right. *Id.* In *State ex rel. Montgomery v.*
9 *Padilla*, 238 Ariz. 560 (App. 2015), Division One interpreted the statute and held
10 that the subject matter of requests by victims in a criminal case is limited and “must
11 be directed to ‘enforc[ing] any right or to challeng[ing] an order denying any right
12 guaranteed to victims.’” *Padilla*, at 566, ¶ 22. APAAC recommends that Petitioner
13 clarify that the proposed changes to the rules enumerated here apply to only those
14 matters that directly involve a victim enforcing a right or challenging a denial of a
15 right.
16
17
18

19 **4. Rule 15.1 (Disclosure)**

20 As it did in R-18-0001, Petitioner proposes limitations on a court’s ability to
21 order disclosure. Rule 15.1(g)(1) allows a court, on a defendant’s motion, to order
22 any person to make available material or information if the court finds substantial
23 need and undue hardship to gain that information by other means. The petition
24 proposes limiting this disclosure provision to any person “*other than the victim.*”
25

1 Ariz. Const. art. 2, § 2.1.(A).5 gives a victim the right to refuse a “discovery request
2 by the defendant[.]” However, in *State ex rel. Romley v. Superior Court (Roper)*,
3 172 Ariz. 232 (App. 1992), the court ruled that while the VBR allows a victim to
4 refuse a discovery request by the defendant, the VBR “must yield to the federal and
5 state constitutions’ mandates of due process of law” in order for a defendant to have
6 a fair trial and present an adequate theory of the case. 172 Ariz. at 240. There, the
7 matter was remanded for an *in camera* review of the victim’s medical records. While
8 *Roper* was fact-specific to the defendant’s justification defense, it illustrates that a
9 due process right to a fundamentally fair trial may outweigh a victim’s right to refuse
10 a discovery request. (See also, *State ex rel. Romley v. Dairman*, 208 Ariz. 484, 490,
11 ¶¶ 22-23 (App. 2004) (independent constitutional interests of the defendant and
12 victim require the court to exercise its discretion in protecting each of the competing
13 interests); *State v. Riggs*, 189 Ariz. 327, 330 (1997) (“if...the victim’s state
14 constitutional rights conflict with a defendant’s federal constitutional rights to due
15 process and effective cross-examination, the victim’s rights must yield”). APAAC
16 again recommends that Petitioner consider modifying its proposal to say “*other than*
17 *the victim absent a determination by the court that the evidence would be*
18 *exculpatory.*”

24 5. Rules 16.3 (Pretrial conference)

25 As it did in R-18-0001, Petitioner proposes limitations on a court’s ability to

1 set evidentiary hearings and pretrial conferences. Rule 16.3(d) allows the court at a
2 pretrial conference to hear motions, set evidentiary hearings and other pretrial
3 conferences, obtain stipulations on facts, and determine other matters affecting the
4 trial, such as time limits, juror notebooks and managing exhibits. The petition
5 proposes a limitation on this rule that the court may only set evidentiary hearing or
6 additional pretrial conferences “*after considering the rights and views of the victim,*
7 *the victim’s right to a speedy trial, and the victim’s right to be present at all*
8 *proceedings.*” A.R.S. § 13-4435.F requires the court, before ruling on a motion for
9 a continuance, to consider the victim’s views and rights to a speedy trial. APAAC
10 recommends that the proposed changes to Rule 16.3 be clarified to apply only to
11 continuances considered by the court at the pretrial conference, as outlined in A.R.S.
12 § 13-4435.F.

16 **6. Rules 16.4 (Dismissal of prosecution)**

17 As it did in R-18-0001, Petitioner proposes a requirement that the court
18 consider the views of a victim before dismissing a prosecution. Rule 16.4(a) allows
19 the State to move for a dismissal of a prosecution for good cause, which the court
20 may grant if dismissal is not to avoid Rule 8 time limits. Petitioner again proposes
21 adding a requirement to the rule that the court may only order the dismissal under
22 this subsection “*after considering the views of the victim.*” This proposal inserts the
23 court into the State’s decision to dismiss a prosecution, which is not something that
24
25

1 currently exists either in the VBR or VRJA statutes. A fair reading of the proposed
2 rule change language could give a victim the right to object to a dismissal. Certainly,
3 a victim has the right to confer with the prosecution about a dismissal (A.R.S. § 13-
4 4419.A), but that right does not extend to the court denying a dismissal if the victim
5 objects. A prosecuting attorney must be free to decide which cases to pursue or not,
6 and the caselaw is clear that a prosecutor has broad discretion to prosecute cases
7 “regardless of the wishes of the victim.” *State v. Granados*, 172 Ariz. 405, 408, 837
8 P.2d 1140, 1143 (App. 1991). Under the VRJA, a victim has no authority to direct
9 the prosecution of a case. A.R.S. § 13-4419.C. APAAC recommends that if the
10 proposed revision is to be adopted, it should be amended to state “*after determining*
11 *that the victim has conferred with the prosecutor.*”
12
13
14

15 In addition, Rule 16.4(d) states that dismissal of a prosecution is generally
16 without prejudice unless the interests of justice require dismissal to be with
17 prejudice. The petition proposes adding a requirement that dismissal can be with
18 prejudice “*only after considering the rights of the victim to justice and due process.*”
19 APAAC again cautions that whether to dismiss a case with or without prejudice is a
20 purely legal determination by the court which must weigh all the factors that bear on
21 that issue. *State v. Garcia*, 170 Ariz. 245, 248, 823 P.2d 693, 696 (App. 1991). Any
22 consideration of the interests of justice by the court should inherently include the
23 victim’s right to due process and justice.
24
25

1 **B. Repeal of Rule 39**

2 Petitioner asserts that Rule 39 “does not provide proper guidance to trial courts
3 and attorneys” on when victims’ rights apply under the various rules. Petition, p. 3.
4 However, for thirty years, Rule 39 has been often cited and commonly understood
5 by courts and practitioners as a primary source for victims’ rights. Rule 39 was the
6 foundation upon which both the VBR and VRJA were based. Numerous appellate
7 decisions affecting the rights of crime victims address specific provisions of Rule
8 39. Across the state prosecutors’ offices and victim advocates utilize Rule 39 as a
9 tool for training and understanding victims’ rights. As it did in its comment to R-18-
10 0001, APAAC again cautions that by a full repeal of Rule 39, a long-standing and
11 stalwart source for victims’ rights information could be lost and those enumerated
12 rights diminished in the process.
13

14 **III. CONCLUSION**

15 The Arizona Prosecuting Attorneys’ Advisory Council recognizes and again
16 commends the Arizona Voice for Crime Victims on its efforts to provide victims a
17 more meaningful participation in the criminal justice process by integrating victims’
18 rights throughout the various Arizona Rules of Criminal Procedure.
19

20 ...

21 ...

22 ...

1 RESPECTFULLY SUBMITTED this 18th day of March, 2019.

2
3 Elizabeth Burton Ortiz

4 Elizabeth Burton Ortiz, #012838

5 Executive Director

6 Arizona Prosecuting Attorneys'

7 Advisory Council

8 Electronic copy filed with the
9 Clerk of the Arizona Supreme Court
10 this 18 day of March, 2019.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
By: 